Supreme Court, U.S.
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No. 04 52

IN THE SUPREME COURT OF THE UNITED STATES

BERTRAM RICE, et al., *Petitioners,*

v.

STEVEN MARTELL COLLINS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. *Section 2254(d) of Title 28 of the United States Code provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim– (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . ." Section 2254(e)(1) provides: "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."*

The Question Presented is:

Does 28 U.S.C. § 2254 allow a federal habeas corpus court to reject the presumption of correctness for state fact-finding, and condemn a state-court adjudication as an unreasonable determination of the facts, where a rational fact-finder could have determined the facts as did the state court?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

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v.

STEVEN MARTELL COLLINS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Petitioner Bertram Rice, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The Ninth Circuit's opinion is reported as *Collins v. Rice*, 348 F.3d 1082, 1088 (9th Cir. 2003), *opinion modified and superseded on denial of rehearing*, 365 F.3d 667 (9th Cir. 2004). The order of the United States District Court for the Central District of California is unreported. Each is reproduced in the Appendix to this Petition. Additional relevant orders are also reproduced in the Appendix, including the unpublished opinion of the California Court of Appeal affirming the judgment of conviction.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit reversing the judgment of the District Court and remanding the matter with instructions to grant the writ of habeas corpus was filed on November 7, 2003. App. B. The Ninth Circuit's denial of the Warden's petition for rehearing with suggestion for rehearing en banc, with modifications to the opinion and the dissent from the denial of rehearing en banc, were filed on April 8, 2004. App. A. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> . . . .
>
> (e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a

> determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

The Crime

On March 19, 1996, after a traffic stop, respondent Collins was arrested pursuant to an outstanding arrest warrant. During a search, .10 grams of rock cocaine was discovered in Collins' possession.

The State Court Proceedings

Collins was tried for possession of rock cocaine. During voir dire, Prospective Juror 16 informed the court that she lived in Inglewood, California, was single, had no children, no prior jury experience and worked as an automations clerk for the Federal Aviation Administration. Prospective Juror 16 also stated that no one close to her had ever been accused of drug related offenses, that she had no reason to believe drug dealers were in her neighborhood, and that she believed possession of rock cocaine should be against the law. Finally, Prospective Juror 16 said that neither she nor anyone close to her had had a problem with alcohol or drugs, and that she had never been employed in law enforcement. App. I at 125-30.

The prosecutor exercised four peremptory challenges – two White prospective jurors (Prospective Jurors 6 and 8) and two African-American prospective jurors (Prospective Jurors 16 and 19) were excused. After the prosecutor exercised her peremptory challenge against the second African-American prospective juror, the defense objected to the peremptory challenges under *People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890 (1978), which prohibits the use of peremptory challenges to remove prospective jurors on the basis of group bias, i.e., an identifiable group distinguished on racial, religious, ethnic, or similar grounds. App. A at 15-16; I at 157; J at 182.

During the hearing on the *Wheeler* objection, defense counsel noted that the last two jurors excused by the prosecution were both African-Americans. The prosecutor responded that she had excused "two white people and two Black people," and that there were still two people of color in the prospective jury panel. The trial court determined that a prima facie case of racial discrimination had been established and asked the prosecutor to justify her peremptory challenges of Prospective Jurors 16 and 19. The prosecutor responded as follows:

> Ms. 016 as well as Ms. 019 were both young and I was concerned with them being too tolerant for this type of case. [¶] Also, Ms. 016 made a remark when the judge made a response to her comment "uh-huh," she turned away and rolled her eyes.
>
> I don't think you asked her specifically to give a yes or no, but she went "yes," and rolled her eyes and turned away from the court. [¶] She and Mr. 006 (White male) were both single, no ties.
>
> . . . .
>
> That was the reason for excusing her, rather than her being an African-American.
>
> 019, she also had a daughter having a drug problem and she talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience.

App. A at 16.

The trial court asked the prosecutor whether she had any additional justification for excusing Prospective Jurors 16 and 19. The prosecutor noted that Collins was an African-American male, that the two jurors excused were African-American females, and that an African-American male and another female who appeared to be African-American were still seated on the panel. During the subsequent discussion, the prosecutor asked

whether the court wanted case law supporting her reasons for dismissing the jurors. App. A at 16-17.

After the prosecutor mentioned gender, defense counsel asserted that the prosecutor was seeking a "more male-female balance" or older people on the jury. After further discussion, the prosecutor clarified that she had referred to the prospective jurors' gender in relation to their lack of ties to the community. App. A at 17-19; J at 183-84.

After this exchange, the trial court denied the *Wheeler* objection, stating:

> With regard to 016, the Court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the District Attorney; however, Ms. 016 was a youthful person, as was 006. And one or more other prospective jurors also.
>
> The court is prepared to give the District Attorney the benefit of the doubt as to Ms. 016. [¶] So the motion under the *Wheeler* case is denied at this time. . . .

App. A at 18; J at 184.

The jury found Collins guilty and the trial court sentenced him to state prison for twenty-five years to life. App. J at 174.

On direct appeal, Collins alleged that the trial court improperly denied the *Wheeler* motion as to Prospective Juror 16 only. Collins asserted that, because the trial court had not observed the juror's demeanor, she had been improperly dismissed solely because of her age, in violation of his federal constitutional rights. App. J at 179-93. Deciding the issue under both *Wheeler* and *Batson v. Kentucky*, 476 U.S. 79 (1986), the California Court of Appeal affirmed, stating that there was no caselaw supporting the proposition that young people are a "cognizable class" and that the prosecutor therefore had articulated a legitimate race-neutral reason for excusing Prospective Juror 16. The Court of Appeal further found that,

even if her youth were not a valid reason for challenging Prospective Juror 16, the prosecutor also had stated that she dismissed her because she had rolled her eyes and turned away from the trial court when the trial court spoke to her, conduct that could have been indicative of hostility or disrespect. Even though the trial court did not observe the prospective juror's behavior, the Court of Appeal found that the record, including the trial court's decision to give the prosecutor the benefit of the doubt as to Prospective Juror 16's demeanor, indicated the trial court approached its task appropriately and thus the conclusions reached by the trial court were entitled to great deference. App. H at 112-17.

The California Supreme Court denied Collins' petition for discretionary review.

The Federal Habeas Corpus Proceedings

Collins filed a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction on the ground that Prospective Juror 16 had been improperly dismissed solely because of her age, because the trial court had not observed the juror's demeanor, in violation of his federal constitutional rights. The district court denied the petition, finding that Collins had not rebutted the trial court's finding, that the prosecutor's two reasons for excusing Prospective Juror 16 were legitimate and race-neutral, with clear and convincing evidence and that "the decisions of the state courts were not contrary to, or an unreasonable application of, clearly established federal law." App. F at 101-05.

In a published 2-to-1 opinion, the Ninth Circuit reversed. Reviewing the same state court record, but reaching conclusions diametrically opposed to those reached by the state trial court, the panel held that the state courts' findings that the prosecutor had challenged Juror 16 on the basis of the juror's age and demeanor amounted to an "unreasonable determination of the facts" under § 2254(d)(2); that "clear and convincing" evidence

proved that the prosecutor's stated reasons were pretexts for racial discrimination under § 2254(e)(1); and that, under §2254(d)(1), the state appellate court had engaged in an "unreasonable application" of clearly established Supreme Court precedent in deciding that the trial court had fulfilled its *Batson* duty to determine whether Collins had established purposeful discrimination. App. A at 35-40; App. B at 76-81.

In dissent, Judge Hall concluded that the majority had actually conducted a *de novo* review regarding the credibility of the prosecutor and her stated reasons for dismissing Prospective Juror 16, and had merely given lip service to the appropriate Anti-Terrorism and Effective Death Penalty Act (AEDPA) standard of deference for the state court's factual findings. App. A at 40-45; B at 82-89. Judge Hall noted,

> Both the majority opinion and the record are devoid of any basis for concluding that the prosecutor's statements and demeanor left the trial judge with *no permissible alternative* but to reject the prosecutor's race-neutral justifications.

App. A at 45; B at 89.

The Ninth Circuit denied the Warden's petition for rehearing with suggestion for rehearing en banc. In dissent, Judge Bea (with whom Judges Kleinfeld, Gould, Tallman and Callahan joined) also criticized the majority for conducting a *de novo* review by

> demean[ing] demeanor evidence and nitpick[ing]the record to find that, as a matter of law, the trial judge cannot find the prosecutor credible if there is evidence in the record to support the opposite conclusion.

App. A at 8.

The Warden filed a motion to stay the issuance of the

mandate in the Ninth Circuit pending this Court's disposition of the case. On April 29, 2004, the Ninth Circuit granted the motion. App. C.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted in this case for two reasons. First, the Ninth Circuit's rejection of the state court's witness-credibility findings conflicts with this Court's jurisprudence on the scope of the federal review of factual determinations governed by the habeas-corpus statutory presumption of correctness. Second, the Ninth Circuit's reliance upon 28 U.S.C. § 2254(d)—a provision that is itself another tight restriction on federal-court power—as a source of authority to defeat the statutory presumption of correctness raises an important issue concerning the construction of the habeas corpus statute, is inconsistent with this Court's teaching on the subject, and conflicts with constructions of the statute endorsed by at least one other circuit court of appeals.

1. Before Congress overhauled the federal habeas corpus statutes by enacting AEDPA in 1996, former 28 U.S.C. § 2254(d) prescribed a presumption of correctness for state-court fact determinations, conditioned by a number of specific contingencies and exceptions. For instance, under former § 2254(d)(6), the presumption did not apply when "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding." Likewise, under former § 2254(d)(8), the presumption did not apply when the state court factual determination was not "fairly supported by the record." App. K.

But, in enacting current § 2254(e)(1) as part of AEDPA, Congress deleted those contingencies and exceptions. Section § 2254(e)(1) now provides simply that a state court's factual determination "shall be presumed to be correct" unless the prisoner carries the burden "of rebutting the presumption of

correctness by clear and convincing evidence." In addition, through §§ 2254(d)(1) and (d)(2), Congress now has precluded habeas corpus relief entirely for claims adjudicated on their merits by the state court, unless the state court decision was "contrary to, or involved an unreasonable application of" this Court's clearly established law or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

In the instant case, the state courts made findings that the prosecutor challenged Prospective Juror 16 on account of her youth and demeanor, not her race. There can be no doubt that such findings were made, either explicitly or implicitly. See *Townsend v. Sain*, 372 U.S. 292 (1963) (recognizing presumption for explicit or implicit findings). Nor can there doubt that the state-court record contained support for those findings.

First, the prosecutor stated that those were her reasons. App. A at 16-17. And, in accepting the prosecutor's reasons and overruling Collin's objection, the trial judge explained that the juror in fact was "youthful," and further expressed its determination to accept the juror's "roll[ing] her eyes" as an additional reason for the challenge. App. A at 18. On direct appeal, Collins conceded that the juror's youth was in fact the prosecutor's motivation; he argued instead that youth was not a legally sufficient reason for the strike. App. J at 187-92. The state appellate court upheld the prosecutor's "reliance on prospective juror no. 016's youth" as proper, and further ruled that the challenge was proper in light of the prosecutor's statement about the juror's eye-rolling demeanor and the trial judge's determination to give the prosecutor the benefit of the doubt with respect to her stated reasons. App. H at 115-17. Likewise, the Ninth Circuit recognized that the trial judge "appeared to credit the prosecutor's discussion of Juror 016's youthful age and her alleged demeanor as race-neutral justifications" (App. A at 22, 31 n.11, 35), that the state appellate court had determined that the prosecutor had

dismissed the juror because of her age (App. A at 24, 26 n.8, 31, 35), and that the state appellate court reasonably determined that the trial judge had accepted demeanor as an alternate reason "on account of the prosecutor's credibility." App. A at 31. Conversely, there was no evidence that Prospective Juror 16 was not young or that she had not rolled her eyes as described by the prosecutor. As this Court has made clear, a state court's determination under *Batson* to credit the prosecutor's stated reasons as true is essentially a factual finding entitled to great deference. *Hernandez v. New York*, 500 U.S. 352, 364 (1991) ("the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal"). And, under the language of AEDPA's strengthened statutory presumption of correctness in § 2254(e)(1), a factual determination by the state court is simply to be "presumed correct" in habeas corpus proceedings, unless the applicant rebuts it with "clear and convincing evidence."

2. Here, however, the Ninth Circuit did not properly hold Collins to that AEDPA standard. Instead, rejecting the direct statement of the prosecutor that the state courts had credited, the 2-to-1 panel majority treated potential competing inferences from mere circumstantial evidence as "clear and convincing evidence" under § 2254(e)(1) that the prosecutor's reasons in fact were race-based. The 2-to-1 majority also rejected the state court's adjudication of the *Batson* claim, based on the state courts' acceptance of the truth of the prosecutor's explanation, as an "unreasonable determination" of the facts under § 2254(d)(2) and as an "unreasonable" application of *Batson* under § 2254(d)(1). None of these grounds was correct, and the Ninth Circuit's reliance on them raises an important question deserving of certiorari review.

a. In overriding the § 2254(e)(1) presumption, the Ninth Circuit disregarded the trial judge's observations of the juror and the prosecutor, and instead drew tenuous, non-necessary inferences from circumstantial evidence in a "cold" record to

support a contrary account of the facts. The panel majority's rejection of the state court's credibility determination was wrong under the AEDPA restrictions on habeas corpus and would have been wrong even under pre-AEDPA law that was more favorable to granting the writ. For, as this Court has held, a federal habeas court may not second-guess the state trial judge on the issue of witness credibility. *Marshall v. Longberger*, 459 U.S. 422, 434 (1983) ("federal habeas courts [had] no license to redetermine the credibility of witnesses whose demeanor has been observed by the state trial court, but not by them"); *LaVallee v. DellaRose*, 410 U.S. 690 (1973).

It may be true that a state-court credibility determination might be overcome in circumstances where no rational fact-finder could have determined the facts as the state court did. This arguably might occur in some extreme situations if the credited witness was not personally observed by the state judge or if physical evidence completely refutes the witness' testimony. *Cf. Miller-el v. Cockrell*, 537 U.S. 322, 339 (2003) (suggesting that credibility findings might be overcome); *Wiggins v. Smith*, 123 S. Ct. 2527 (2003) (records in fact did not contain information witness said they contained). But no such circumstances obtain in this case.

Here, in contrast, the panel majority re-determined the credibility findings of a trial judge who had the benefit of its first-hand observations of the prosecutor's conduct, responses, and demeanor. And a rational fact-finder could have concluded that the prosecutor's stated reasons for the strikes were genuine. The prosecutor's explanation did not describe any physical impossibility. To the contrary, her statements found factual support in the state record. To overcome such a credibility finding, the Warden submits, the proffered "clear and convincing evidence" should leave no doubt about the matter, *see Schneiderman v. United States*, 320 U.S. 118, 135 (1943), in the sense that no rational fact-finder could have found otherwise. *See Hernandez v. New York*, 500 U.S. at 369 ("[w]here there are two permissible views of the evidence, the

factfinder's choice between them cannot be clearly erroneous").

b. Similarly, in otherwise finding fault with the state-court credibility determination, the Ninth Circuit simply drew different inferences from circumstantial evidence. For example, the Ninth Circuit concluded that the prosecutor was not credible because she had made an "incorrect factual statement" regarding not Prospective Juror 16, but Juror 19 instead, by identifying her as young when she was actually a grandmother. App. A at 33. As Judge Hall explained in her dissenting opinion, however, the prosecutor merely had mis-spoken in the course of a *Batson* discussion that pertained to challenges to both Prospective Jurors 16 and 19 and also to Prospective Juror 6, a young White male. App. A at 41-43. Even if the competing inference drawn by the panel were arguable, however, it was hardly compelling and cannot logically be deemed mandatory.

In a similar vein, the panel drew an adverse inference from the prosecutor's statement that a youthful juror might be too tolerant of drug offenses. App. A at 27. Again, even if not wholly inexplicable, the inference drawn by the panel was neither compelling not necessary. The same is true for other adverse inferences drawn by the panel from the fact that the prosecutor had declined to challenge a juror whose child had a cocaine problem, and from the fact that the prosecutor had alluded to a "male-female balance" on the jury. App. A at 28-30, 33-34. Such inferences, here arguable at best but never mandatory in the sense that all reasonable judges would be compelled to credit them over the prosecutor's denial, cannot suffice as a basis to reject state court findings to the contrary. *See Hernandez*, 500 U.S. at 369.

3. The Ninth Circuit also concluded that the state court's credibility and factual findings were not fairly supported by the record and that, therefore, the state-court's *Batson* adjudication was based on an "unreasonable determination of the facts" within the meaning of § 2254(d)(2). And it further concluded that the state trial court, in crediting the prosecutor's stated

reasons, had engaged in an "unreasonable application" of *Batson* within the meaning of § 2254(d)(1). App. A at 31-40. Trumping the § 2254(e)(1) presumption through the use of § 2254(d), however, presents an important question warranting this Court's attention.

a. Neither (d)(1) nor (d)(2) can serve as a tenable basis for overcoming the (e)(1) presumption. The AEDPA's fundamental re-working of habeas corpus review in § 2254(d), strictly limiting even further federal court authority to grant the writ on claims adjudicated on their merits in state court, cannot properly be employed as an affirmative grant of authority to reject state-court fact determinations otherwise protected by the presumption of correctness in § 2254(e)(1). Employing § 2254(d) to permit relief based on the federal court's view of whether the state ruling was fairly supported by the record or whether the state procedures were adequate, as the panel employed it here (App. A at 34-35), would negate Congress' strengthening of the presumption in (e)(1) by, in effect, reading back into the habeas-corpus statutes a kind of "intrinsic review" of state court findings that Congress removed when it deleted the list of pre-conditions and exceptions to the pre-AEDPA version of the presumption in the first place. *Cf.* Former § 2254(d)(6), (d)(8).

b. Such employment of the § 2254(d) to trump or to reduce the effect of § 2254(e)(1) conflicts with this Court's statements, in *Miller-el v. Cockrell*, 537 U.S. at 341-342, that (d) and (e)(1) are "independent" provisions and that the petitioner must satisfy each provision before obtaining relief. It also appears to conflict with this Court's application of those provisions in *Wiggins v. Smith*, 123 S.Ct. 2527 (2003). Before granting relief, *Wiggins* found both (d)(2) and (e)(1) satisfied. *Id.* at 2538-39. Indeed, *Wiggins* helps establish that it is when the state fact-finding protected by the (e)(1) presumption indeed has been overcome by "clear and convincing evidence to the contrary" presented in the state proceeding—there, the physical evidence showed that the state fact-finding could not possibly

have been correct—that a resulting state-court adjudication may be deemed "unreasonable" under (d)(2). In other words, until overcome by "clear and convincing evidence" pursuant to (e)(1), state-court factual determinations are "presumed to be correct" and, as such, cannot logically be deemed "unreasonable" under (d)(1) or (d)(2).

c. The Ninth Circuit's apparent employment of § 2254(d), and the alleged inadequacy of the state record and the alleged insufficiency of the state judge's inquiry at the *Batson* hearing, to trump § 2254(e)(1), also conflicts with constructions of those AEDPA provisions in other Circuits. In *Valdez v. Cockrell*, 274 F.3d 941, 950-51 & n.17 (5th Cir. 2001), the Fifth Circuit explained that it would be "untenable" to conclude that Congress' AEDPA deletion of the pre-conditions to the pre-AEDPA statutory presumption had been rendered ineffective by § 2254(d), and it rejected the notion that (d)(2) and (e)(1) should be read together to re-import a "full and fair hearing" prerequisite to the operation of the presumption. In *Mendiola v. Schomig*, 224 F.3d 589, 592 (7th Cir. 2000), the Seventh Circuit reached a similar conclusion. In this regard, the State of California in *Mueller v. Nunes*, No. 03-15509, has filed a certiorari petition on the issue of whether the "full and fair hearing" requirement survives the strengthened AEDPA presumption of § 2254(e)(1), and this Court recently ordered the respondent in that case to file a brief in opposition to the State's petition.

4. As evidenced by the many cases decided in which this Court over and over was constrained to step in and reverse Ninth Circuit misapplications of § 2254(d)(1). *E.g.*, *Yarborough v. Alvarado*, 124 S. Ct. 2140 (2004)); *Middleton v. McNeil*, 124 S. Ct. 1830 (2004) (per curiam); *Yarborough v. Gentry*, 124 S. Ct. 1 (2003) (per curiam); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam); *Early v. Packer*, 537 U.S. 3 (2002) (per curiam), the Circuit has repeatedly failed to give California state-court rulings the deference they deserve under the AEDPA. *See Clark*

v. *Murphy*, 331 F.3d 1062, 1068 (9th Cir. 2003). A new series of cases shows that the Circuit is compounding its AEDPA failures by failing to defer under §§ 2254 (d)(2) and (e)(1) to state-court resolutions of factual questions. *E.g.*, *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004) (relying on hearsay to reject state court findings, after evidentiary hearing, that police officer's account of interrogation was creditable and that the defendant's contrary account was not creditable); *Sanders v. A.A. Lamarque*, 357 F.3d 943 (9th Cir. 2004) (rejecting state court finding that a juror was prejudiced); *Hall v. Director of Corrections*, 343 F.3d 976 (9th Cir. 2003) (rejecting state-court finding, made after evidentiary hearing, that written notes had not been doctored to change their meaning); *Avila v. Galaza*, 297 F.3d 911 (9th Cir. 2002), cert. dismissed, 538 U.S. 919 (2003) (rejecting state-court findings, made after evidentiary hearing, that new defense witnesses were not credible and none would have been available to testify at trial).

CONCLUSION

For all of these reasons, the Warden respectfully asks the Court to grant the petition for writ of certiorari.

Dated: July 6, 2004

Respectfully submitted,

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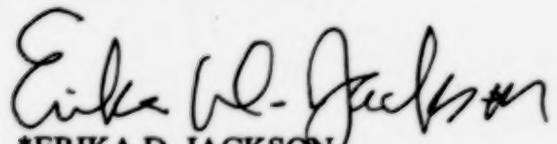

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